UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANN STAUBER and the NEW YORK CIVIL LIBERTIES UNION,

Plaintiffs,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

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JEREMY CONRAD,

Plaintiff,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

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JEREMIAH GUTMAN and the NEW YORK CIVIL LIBERTIES UNION,

Plaintiffs,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

----------X

O P I N I O N

03 Civ. 9162 (RWS)

03 Civ. 9163 (RWS)

03 Civ. 9164 (RWS)

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Sweet, D.J.

The plaintiffs in above-captioned cases, Ann Stauber ("Stauber"), Jeremy Conrad ("Conrad"), and the New York Civil Liberties Union (the "NYCLU")[1] have moved pursuant to Federal Rule of Civil Procedure 65 for preliminary injunctive relief against the defendants the City of New York, Police Commissioner Raymond W. Kelly ("Commissioner Kelly"), and Officers Marvina C. Lawrence and Does 1-10 (collectively, the "defendants" or "the City"), with respect to practices by the New York City Police Department ("NYPD") at stationary rallies. For the reasons set forth below, the motion is granted in part and denied in part.

Issues

In this action security in the form of governmental regulation of demonstrations directly confronts liberty interests of free speech and assembly. Difficult issues of standing and constitutional law complicate the achievement of the delicate balance between these powerful concepts. That balance is of particular importance to citizens and their government in times of heightened political tension and threatened challenges to public safety. The specific event which precipitates this litigation is the Republican National Convention (the "Convention"), scheduled to take place in New York City from August 30 to September 2, 2004,

[1] Plaintiff Jeremiah Gutman died on February 25, 2004.

and the intention of the plaintiffs and others to express their opposition to the Convention and to the actions of the President and his Administration. The following findings of fact and conclusions of law seek to define a resolution which can serve to encourage free expression in a secure society.

Plaintiffs seek injunctive relief to enjoin four alleged practices: (1) the practice of unreasonably impeding access to demonstration sites without making reasonable efforts to provide information to the public about how otherwise to attain access to the site (the "access policy"); (2) the practice of unreasonably restricting access to and participation in demonstrations through the use of metal, interlocking barricades to create "pens" in which demonstrators are required to assemble (the "pens policy"); (3) the unreasonable, generalized searching of the possessions of persons as a condition of attaining access to certain demonstrations (the "bag search policy"); and (4) the unreasonable use of horses forcibly to disperse peacefully assembled demonstrators (the "Mounted Unit policy"). The defendants argue that plaintiffs lack standing to bring their claims, and justify these practices on the grounds of security and public safety.

While plaintiffs argue that each of the practices they seek to enjoin are widespread policies that have been in place for some time, each was most prominently used at the February 15, 2003

demonstration against the then-proposed military action in Iraq (the "February 2003 demonstration").

Parties

Stauber is 61 years old, has lived in New York City since 1961, and has been a member of the NYCLU since 1989. As a result of a medical condition known as Ehler-Danlos syndrome, Stauber has been confined to a wheelchair since 1991. In the ten years prior to the February 2003 demonstration, Stauber has not attended any demonstrations.

Conrad is a student at Brooklyn Law School. Prior to the February 2003 demonstration, Conrad had not participated in any demonstrations in the United States.

The NYCLU is a membership organization whose mission it is to defend the Bill of Rights and rights guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution and for which protection of First Amendment rights is a "core mission." The NYCLU has approximately 30,000 members statewide, with approximately 20,000 members in New York City.

NYCLU members have attended political demonstrations in New York City, including the February 2003 demonstration, and

several members testified to the continuing intent of its members to attend demonstrations.

The NYCLU has sponsored demonstrations in New York City and will be sponsoring a large demonstration scheduled to take place at the Convention later this year.

The City of New York is a municipal corporation within the State of New York.

Commissioner Kelly is the Commissioner of the NYPD. He is being sued in his official capacity.

Officer Marvina C. Lawrence ("Officer Lawrence") is a police officer employed by the NYPD. She is being sued in her official and individual capacities for monetary damages.

Defendants Does 1-10 are individuals employed by the NYPD whose identities were not known to Conrad when the lawsuit was filed. These defendants allegedly arrested Conrad, assaulted him while making the arrest, and ordered that he be detained an unreasonably lengthy period of time in unlawful conditions. They are being sued in their official capacities for compensatory damages and in their individual capacities for compensatory and punitive damages.

Prior Proceedings

Each of the actions was filed on November 19, 2003. For the purposes of the claims for injunctive relief only, the three claims were consolidated. Each action, however, retains its own docket number.

Each action seeks both injunctive relief and monetary damages. After expedited discovery on the claims for injunctive relief, the plaintiffs moved on June 2, 2004 for a preliminary injunction. The defendants moved simultaneously to dismiss the plaintiffs' Monell claims, including the claims for injunctive relief. A hearing on the preliminary injunction was held between June 2 and June 7, 2004 (the "hearing"). Final argument on the motion was heard on June 17, 2004, at which time the motion was deemed fully submitted. Several letters from both sides were received by the Court after that date.

FINDINGS OF FACT

The NYPD's Use of Barricades and Pens

Before the NYPD implemented the use of barricades and later, pens, large gatherings of people in Manhattan filled all available spaces between buildings. At New Years' Eve celebrations in Times Square in the mid-1950's, for example, thousands of people

would turn out, blocking all vehicular traffic. Under current policies, by contrast, the NYPD at New Year's Eve celebrations make considerable use of metal perimeter barricades, including the use of "pens," which are four-sided enclosures created from several interlocking metal barricades. According to Police Chief Joseph Esposito ("Chief Esposito"), the highest ranking member of the uniformed force, the use of pens provides many advantages:

> You have got much more control of the situation. You can have emergency vehicles come in and out without any problem at all. You can have officers around these barricades ... If there is any crime going on ... it would be a lot easier to address a crime situation under this condition.
>
> If ... someone [were to] be injured or have some type of seizure or attack, under the old way, I can't see how you would get that person out in a timely fashion. Under the new way of Times Square, the way we do it with the pens, it's a lot easier to get an injured person out and get aid.

Preliminary Hearing Transcript ("Tr.") at 484-85. The police have used wooden barricades at demonstrations for decades, and have used four-sided pens at demonstrations since at least 1995.

Demonstrations and parades over the years have ranged from cultural events to protests. Parades for Dominican Day, Puerto Rican Day and Saint Patrick's Day have involved the participation of over 100,000 people. United for Peace and Justice v. City of New York, 243 F. Supp. 2d 19, 26 (S.D.N.Y. 2003). The events surrounding recent protest demonstrations follow.

The February 2003 Demonstration

The February 2003 demonstration was organized by United for Peace and Justice ("UPJ"), whose national coordinator, Leslie Cagan ("Cagan"), testified at the hearing. UPJ is a nationwide coalition of national associations and local groups that formed to create a unified effort to oppose the military action in Iraq, and then later to end the occupation of Iraq. On January 22, 2003, UPJ initially proposed a march and rally for February 15 which would have begun with an assembly of people on Second Avenue in Manhattan, with people assembling on side streets from 47th Street going up several blocks. Those assembled would then march past the United Nations on First Avenue and then march over to 42nd Street to a northbound avenue, and from there into a rally at Central Park.

The City denied the request to have the march and rally as described, and UPJ litigated the denial of the permit in federal court, where the denial of the permit was upheld by the district court on February 10, 2003, and by the Second Circuit on February 12, 2003. See United for Peace and Justice v. City of New York, 243 F. Supp. 2d 19 (S.D.N.Y. 2003), aff'd 323 F.3d 175 (2d Cir. 2003). The City's ban on marching in front of the United Nations was upheld because the "march is simply too large for the NYPD to adequately secure the safety of United Nations headquarters." UPJ, 243 F. Supp. 2d at 24. The City's decision to ban a march, as

opposed to a stationary rally, was upheld because "the heightened security concerns posed by an unorganized, large scale march threaten the City's interest in maintaining public safety." Id. at 29.

After the denial of the permit, UPJ met with the NYPD concerning where the event would take place. The meeting on February 12 was the first organizers had with the NYPD. According to Cagan, the NYPD proposed that the event take place on First Avenue. Cagan objected to the location and proposed moving it to Second Avenue, but her request was denied. The NYPD also indicated its intent to use pens at the event. The term "pen" in this litigation is used by NYPD officials and organizers to describe the NYPD's use of interlocking, metal barricades to create four-sided enclosures in which demonstrators are expected to assemble during demonstrations. Cagan requested that pens not be used, but her request was denied.

During the planning meeting, the NYPD communicated its access plan to UPJ and the NYCLU, who provided legal representation for the organization. See Tr. at 287-89. Neither organization requested that the NYPD post its access plan on its web site, nor did they post access information on their own web sites. UPJ's web site advised people to converge at noon at 51st Street and First Avenue, and stated that a large march would occur in Midtown Manhattan on February 15. In addition, the UPJ web site posted

information on "feeder marches" which would converge at the rally, and advised that "[i]n general, marching on the sidewalk is legal so long as you do not obstruct pedestrian traffic." Defendant's Exhibit O (UPJ web site, printed on February 14, 2003).

On February 15, which was an extremely cold day, the stage for the demonstration was set up on First Avenue between 51st and 52nd Streets. The rally took place north of the stage. The NYPD set up metal barriers along both sides of First Avenue. As demonstrators filled a block to what the NYPD deemed to be a safe capacity, a set of metal barricades was put in place across First Avenue on the north end of the block. After an opening to keep the cross streets open and free of pedestrians, another line of barricades were put in place across the south end of the next block, which would similarly be permitted to fill to capacity and then closed at the north side.

Demonstrators attending the event were required to enter First Avenue from the north. At the early stages of the demonstrations, entry was available at 52nd Street. As the pens began to fill, however, demonstrators had to move further north in order to find an open pen. Individuals seeking to participate in the demonstration were not allowed to use the sidewalks along First Avenue to move north in order to find an open pen. Although the rally began at noon, by 1:00 P.M., First Avenue was filled with large numbers of people up to 60th Street and beyond.

As thousands of demonstrators made their way to the rally site, the NYPD began to close off Second Avenue to those making their way to the rally. Many demonstrators used Third Avenue to make their way north. However, a bottleneck developed at Third Avenue around 53rd Street. According to demonstrators, police were giving conflicting information about which streets were open, and were sending demonstrators in different directions.

At 1:45 P.M., Chief Esposito declared a level 4 mobilization. A level 4 mobilization is the highest level, and "is a citywide mobilization where [the NYPD] pull[s] resources, be it personnel or equipment, from other parts of the city and either stage[s] them or use[s] them for a large-scale disorder." Tr. 557 (testimony of Lieutenant Dennis Gannon ("Lt. Gannon")).

During the afternoon, some members of the crowd behaved in a disorderly manner. Conduct included standing on newsstands and lamp posts, breaking through police barricades, sitting on streets for which permits were not issued, and refusing to move when directed by police officers. The NYPD arrested 274 people during the day of February 15, 2003, for activity related to the antiwar demonstration.

Claudia Angelos ("Angelos"), the president of the NYCLU, attempted to reach the rally site on February 15 with her husband and two teenaged daughters. After reaching Third Avenue, she was

told by police to head north, but was given no further direction as to how to reach the rally. After proceeding north into the 60's, Angelos, along with her family and the rest of the crowd, was directed by police officers down a cross street between Third and Second Avenues. The crowd then was stopped and swelled to the point where it filled the entire street and sidewalks. After finding themselves unable to progress forward towards the demonstration site on First Avenue, Angelos and her family attempted to leave the area by exiting back towards Third Avenue. It was difficult for Angelos and her family to move back towards Third Avenue, and when they got there they discovered that police barricades had been erected at the back of the crowd, thereby trapping the crowd on the block. Because Angelos did not believe that "there was going to be any way ever of getting anywhere close to the demonstration," Tr. at 53, she and her family headed home.

In order to disperse the crowd on Third Avenue, the NYPD deployed its Mounted Unit, which consists of a number of officers on horseback. According to Captain Christopher Acerbo ("Captain Acerbo"), the head of the Mounted Unit, the pedestrian congestion developed on Third Avenue "because the demonstration area on First Avenue was filled and [the demonstrators] were given the option to go north and access the demonstration in the 60s, and they were not cooperating." Acerbo Deposition at 87. Captain Acerbo was told by the zone commander to open up Third Avenue because there was no access for emergency vehicles. The Mounted Unit repeatedly urged

the crowd to disperse. When the crowd did not disperse, the Mounted Unit "moved through the crowd" north on Third Avenue at a very slow pace. Id. at 90-91. The horses were making contact with the demonstrators.

A similar situation occurred on Second Avenue. The Mounted Unit was also deployed on at least two other occasions that day on Third Avenue: once to remove a group of approximately 75 to 100 people who had commandeered a police truck used to carry metal barricades, and once to open Third Avenue to traffic by moving a line of horses southbound on the avenue.

At the rally site on First Avenue, the pens eventually stretched north into the high 70's or low 80's. On each block, the pens had openings only at the front and the back. The pens did not encompass the width of the street, as the NYPD formed the pens so that emergency vehicles could travel down one side of the avenue. Police officers were posted around the sides of the pens, even where there were no openings for demonstrators either to enter or exit.

The Reverend Earl Kooperkamp ("Kooperkamp"), who is the pastor of St. Mary's Episcopal Church in West Harlem, attended the February 2003 demonstration. Kooperkamp attempted to lead members of his congregation to the First Avenue rally site. He arrived at First Avenue with an 87-year-old parishioner and one other person.

When they arrived on First Avenue, they were directed into a pen between 63rd Street and 62nd Street. It was very cold, and he attempted to leave the pen to get a hot drink for the elderly church member. At first the police were not letting anyone out, but then created an opening from which Kooperkamp was able to exit. However, when he returned with the hot drink, the police officer at the opening said he could not re-enter, even though Kooperkamp explained to the officer that he had been in the pen and had just left to get a hot drink for the elderly parishioner. Finally, after about ten minutes, the officer left the opening unattended and Kooperkamp was able to re-enter the pen.

Conrad was attempting to reach the rally site with his girlfriend when they were stopped in the midst of a large crowd on Third Avenue in the vicinity of 53rd Street. Conrad observed a line of mounted officers coming out from a cross street and then turn facing the crowd, which was shoulder-to-shoulder and filled the entire street. The horses then moved into the crowd, resulting in people running in all directions and pushing into each other and yelling. A horse stepped on Conrad's foot and injured him. Conrad was in the block where the Mounted Unit deployed for 15 or 20 minutes but at no time heard any warnings or any orders to disperse. After the demonstration, Conrad’s toe was swollen and remained in poor condition for almost a month. Conrad did not seek medical treatment for his injuries because he did not have health insurance.

Stauber attended the February 2003 demonstration and plans to attend future demonstrations, including the ones held in conjunction with the Convention. She ended up in a pen on First Avenue somewhere near 53rd Street. After being in the pen for a while, Stauber began to feel uncomfortable and needed to go to the bathroom. At first she did not see any openings from which she could leave but then saw an opening at the southern end of the pen. When she approached that opening, she encountered Officer Lawrence and asked her for permission to leave. Officer Lawrence told Stauber she could not leave. Stauber explained that she needed to go home because she was sick and needed to use the bathroom. Officer Lawrence continued to refuse, and Stauber attempted to sneak through the opening when she thought the officer was not looking. Officer Lawrence saw her, however, and grabbed her wheelchair and spun it around, damaging its controls in the process.

Stauber filed a complaint regarding the incident with the Civilian Complaint Review Board ("CCRB"), which substantiated her complaint, and specifically explained that an "officer stood in front of the entrance/exit of the pen area, thereby preventing her from leaving." CCRB Report at 2. Officer Lawrence testified at the hearing, and while she did not dispute that an incident took place, she claimed that it occurred outside a pen. However, as the CCRB Report stated, Officer Lawrence's "credibility is weak," id.

at 10-11, and it is found that the incident took place inside the pen on First Avenue.

Stauber has expressed concern at the prospect of being trapped in a pen at a future demonstration. She now wears adult diapers to demonstrations for fear of not being allowed to leave a pen to go to the bathroom.

According to NYPD estimates, 80,000 people attended the February 2003 demonstration.

April 10, 2003 Pro-War Demonstration

On April 10, 2003, a demonstration in support of the military action in Iraq took place on West Street between Liberty Street and Canal Street in Manhattan. The demonstration was sponsored by the Building and Construction Trades Council of Greater New York. Before the demonstration, the NYPD issued special written instructions to supervising officers on the scene that included the following directive, "All officers assigned are to check backpacks, knapsacks, duffel bags, etc. Those people who refuse will not be allowed into the demonstration area."

September 9, 2003 Demonstration

On September 9, 2003, the NYCLU sponsored a demonstration near Federal Hall in Manhattan to express opposition to United States Attorney General John Ashcroft and to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (the "Patriot Act"). Pens were used at the demonstration, and the Executive Director of the NYCLU, Donna Lieberman ("Lieberman"), received complaints from people who were required by the NYPD to take a circuitous route to the demonstration.

The NYPD searched the bags of several people as a condition of entering the demonstration, including one of the speakers at the rally and an NYCLU staff member. The NYCLU attempted to negotiate the policy with police officers at the scene, but were unable to convince them not to search.

The March 20, 2004 Demonstration

UPJ applied for a permit to hold an antiwar march in Manhattan on March 20, 2004 (the "March 2004 demonstration"). Unlike the February 2003, 2003 demonstration, UPJ was granted a permit for demonstrators to march.

In anticipation of the March 2004 demonstration, the NYPD made considerable efforts to notify the public about access to the

demonstration site. Commissioner Kelly decided that the Department would post on its web site information about access to the event so as to facilitate access to the event. This was the first time the NYPD had used its web site for these purposes.

Commissioner Kelly decided that the NYPD should have a press conference to provide information about how to attain access to the event. According to Commissioner Kelly, he made that decision "[b]ecause I thought it was important to get information out on how to get to the event, what the route would be, because of a lack of information at demonstrations in the past, and particularly because this area has not been an area that had been used frequently in the past for demonstrations for a march." Kelly Deposition at 88. This was the first time the NYPD had held such a press conference.

For the March 2004 demonstration, the NYPD assigned sound trucks to closed access points to provide access information to those seeking to attend the event. This was the first time the Department had done this.

At the request of the NYPD, the organizers of the March 2004 demonstration made changes to their web site to provide information about access to the event.

Reverend Kooperkamp attended the March 2004 demonstration with a number of members of his church. They learned of available access to the event from the NYPD's web site and had no problem gaining access to the event. The March 2004 demonstration went very smoothly without problems as far as the NYPD was concerned.

The NYPD did not use pens at the March 2004 demonstration. Police officials were unable to identify any other large, stationary rally at which pens had not been used. And while it did have barricades lining the curbs on Madison Avenue to keep demonstrators in the street and off sidewalks, the NYPD left openings in those barricades so demonstrators could leave the barricaded area and go on to the adjoining sidewalks.

Before the March 2004 demonstration, the NYPD issued written instructions to supervisors informing them that people attending the demonstration should be allowed to leave barricaded areas and go to nearby stores. Police officials were unable to identify any other instance in which such instructions were issued.

The NYPD estimated that over 40,000 people attended the March 2004 demonstration. Other than a single incident at which it took a little longer to get medical assistance to one person, the NYPD's decision not to use pens at the March 2004 event did not create any problems.

May 23, 2004 Salute to Israel Day Parade

The NYPD searched the possessions of persons seeking to enter a demonstration at the Salute to Israel Parade on May 23, 2004. The parade route was on Fifth Avenue in Manhattan, from the mid-50's up into the 80's. There were also two demonstrations at around 59th Street which took place in two areas across the street from one another, one for pro-Israeli and one for pro-Palestinian demonstrators. In the past, there has been violence and disorder at this event because of the animosity between the two groups. At the event, Deputy Inspector Michael McEnroy ("Inspector McEnroy") received reports from subordinate officers that demonstrators were arriving at the parade with large backpacks and coolers. Based on the potential for violence, Inspector McEnroy instructed his subordinates to ask persons entering the pens on Fifth Avenue to open their bags and coolers. No one refused the request by police officers to open their bags and coolers.

Policies Related to Restriction of Access and Dissemination of Information

The NYPD routinely uses barricades and/or police officers to close streets and sidewalks leading to demonstrations on a few occasions each year. When it does so, it is the standard practice of the NYPD to develop documents and written plans for the closing of streets and sidewalks leading to demonstrations.

The NYPD has detailed written policies concerning its planning for large demonstrations, but the Department has no written policies concerning its practice of closing streets and sidewalks leading to demonstration sites.

The NYPD has never provided written information to event organizers about the closing of streets and sidewalks leading to demonstration sites. Prior to efforts it made with respect to the March 2004 demonstration, the NYPD had never provided any advance information to the public about the closing of streets and sidewalks leading to demonstration sites.

The NYPD has never provided written instructions about alternative routes of access to demonstrations to police officers assigned to locations where the Department had closed streets and sidewalks leading to demonstrations. It also has never posted signs at closed streets and sidewalks leading to demonstration sites about alternative routes of access to the demonstrations.

Prior to the March 2004 demonstration, the NYPD had never assigned sound trucks to closed streets and sidewalks for the purpose of proving information to the public about access to the event.

The only procedure the NYPD has had in place to convey information to the public about access to demonstration sites to

which it has closed certain streets and sidewalks has been to include certain information about street closings on "post lists," which are distributed to supervisory personnel. Under this procedure, supervisory officers are to convey access information orally to police officers assigned to the actual closed access points when they "turn out" for the event. After testifying that the information given to police officers assigned to posts at the February 2003 antiwar demonstration was "accurate," the Department witness who testified about this procedure admitted that he had no knowledge about what, if any, information police officers actually received at their initial turnouts, and testified further that the only information he knew was conveyed during the day was information about the closing of certain blocks. Tr. 584-88 (Lt. Gannon).

High-ranking officials in the NYPD, including Commissioner Kelly, Chief Esposito, and Chief Bruce Smolka ("Chief Smolka"), have testified that greater communication related to access at demonstrations is a good thing. Chief Esposito testified that affirmative steps by the NYPD to facilitate access to demonstrations, like posting access information on its web site, providing materials to organizers, posting signs at closed access points, and having sound trucks at closed access points "are all good and useful things." Tr. 471-72.

Policies Related to Use of Pens

The NYPD routinely uses pens at demonstrations, large and small, in its Patrol Bureau Manhattan South ("PBMS"), which covers the Borough of Manhattan from 59th Street down to the Battery. When pens are set up at a demonstration, the NYPD expects demonstrators to assemble inside the pen. The NYPD has detailed written policies concerning its planning for large demonstrations, but the Department has no written policies concerning its use of pens at demonstrations.

At large events, the NYPD's practice is to set up pens that run the length of the block with a single opening at the back of the pen. Plaintiff's Exhibit 33 is a photograph depicting two block-long pens on First Avenue for a February 15 demonstration, with demonstrators standing shoulder-to-shoulder for the entire length of the block. According to one estimate, 4,000 people may be contained in a block-long pen.

At large events, the NYPD's practice is to allow people to enter from one end of the pen and fill the pen until the Department deems the pen to be full, at which point it physically closes off the entrance to the pen. However, the NYPD has never provided written instructions to police officers about egress or ingress to pens used at demonstrations.

The NYPD has shifted from using wooden barricades for pens to using interlocking, metal barricades because the metal ones

are more effective in keeping people inside the pen, because they interlock, and because they are more difficult to knock over.

Several demonstrators and organizers testified that the limited ingress and egress to pens has caused problems with access to the demonstration.

Leslie Brody, a lawyer who for eight years has represented 20 to 25 groups each year holding demonstrations in New York City, has been personally present at approximately two large demonstrations each year at which pens have been set up for more than one block. In her experience the standard practice of the NYPD is to fill a pen with demonstrators to a certain point and then close the opening to the pen. In her further experience, once pens are full, people experience considerable problems getting out of the pens. Finally, it has been her experience that once pens are full and declared closed by the NYPD, people are not allowed to enter the pen, even if it has space from people having left; instead people are required to enter the next open pen at the back of the demonstration area. As a result of this practice, people cannot leave pens to use the bathroom or get food or water without risking being separated from those they are with. Moreover, as a result of this practice, pens empty over the course of the day, forcing more and more of the demonstrators further and further away from the demonstration itself.

Cagan similarly testified that she has experienced consistent problems at large events trying to find an opening to a pen and has experienced problems with access being delayed because of people being backed up trying to get into small pen openings, resulting at one event in people giving up and leaving the event. Cagan also has experienced problems with people not being allowed back into pens from which they have exited. Cagan further stated that as pens emptied at the February 2003 demonstration, it had the effect of making "the whole event seem smaller than it really was." Tr. at 262.

Many groups are so concerned about the NYPD's use of pens and problems of ingress and egress that they have chosen to keep their events small and to forego applying for amplified-sound permits as a way of avoiding having the Department learn of the event and thus as a way to avoid having the Department use pens at their events. As a result of their personal experience or of reports they have received about the NYPD's use of pens where egress and ingress are severely restricted, the NYCLU and other groups planning future demonstrations are concerned about the NYPD's use of pens at their planned events.

Chief Esposito testified that nothing about configuring pens for the following purposes would undermine the NYPD's legitimate law enforcement interests or its concerns about terrorism: a) so that people can leave to go to the bathroom or go

to a nearby store; b) so that people could freely leave a pen to go home; and c) so that people who leave a pen could re-enter a pen if there was room, so long as that could be done under controlled circumstances.

According to Commissioner Kelly, it is appropriate to give police officers instructions about the rules concerning demonstrators being able to move in and out of pens. Chief Smolka agreed that written instructions concerning the movement of people in and out of barricaded areas are a good idea.

Policies Concerning Blanket Searches of Demonstrators

As of October 2001, the NYPD had instituted a policy in the Manhattan South Borough Command of requiring people seeking to attend certain demonstrations to consent to a search of their possessions as a condition of entry to the demonstration site. Under the NYPD search practice, every person seeking to enter an event was subject to a search of their possessions. If they did not consent to the search, they would not be allowed into the event.

A Deputy Inspector assigned to the Manhattan South Borough Command testified that this practice was used at approximately one-third of the 20 to 30 demonstrations to which he was assigned between October 2001 and March 2004. Those seeking to

enter demonstrations where the Department was searching possessions as a condition of entry to the demonstration would be subject to arrest if the a police officer discovered something illegal.

The NYPD informed a group planning an antiwar demonstration in Central Park for October 2002 that it intended to search the bags of all persons seeking to attend the event. The organizers objected because they were concerned it would dissuade people from coming to the event. Ultimately, the NYPD did not conduct any searches, and the event took place without problem.

In the meeting to prepare for the February 2003 antiwar demonstration, the NYPD informed the event organizers that they intended to search the bags of people seeking to attend the demonstration. The organizers objected to the proposed searches.

At the April 10, 2003 pro-war demonstration, the NYPD issued special written instructions which included orders to search the bags of all persons as a condition for entering the demonstration. This directive is consistent with the NYPD's general practice of searching demonstrators.

The NYPD searched some people seeking to attend the demonstration sponsored by the NYCLU at Federal Hall in September 9, 2003.

Various high-ranking NYPD officials have given different answers as to whether the practice of searching bags as a condition of entry to some demonstrations remains in effect. Chief Smolka testified that the practice of searching the possessions of demonstrators as a condition of entering certain demonstrations had stopped sometime "over the last year perhaps" and was halted at the direction of the NYPD's legal department. Smolka Dep. at 87-88. Commissioner Kelly testified that "[i]t's not a current practice to search people's backpacks going into political demonstrations," although Kelly did not order that the practice be halted. Kelly Dep. at 75, 76-77. However, Kelly also noted that "depending on the circumstances, someone may deem it a practice to be appropriate or needed." Id. at 65. Inspector McEnroy testified that he was given instructions within the last year to stop performing bag searches by Chief Michael Esposito, the former commanding officer of Patrol Borough Manhattan South. Tr. at 596. Finally, Deputy Inspector Joseph Moscatt ("Inspector Moscatt") testified that he understood that the NYPD's demonstrator search policy was in effect at the time he left the Manhattan South Borough Command in March 2004. Tr. at 340.

The United States government considers the Convention, which is scheduled to take place from August 30 to September 2 of this year, to be a potential terrorism target. According to one newspaper report, the C.I.A.'s outgoing head of clandestine operations has stated that "Al Qaeda has unambiguous plans to hit

the homeland again . . . and New York City, I am certain, remains a prime target." David Johnston, Fears of Attack at Conventions Drive New Plans, N.Y. Times, July 5, 2004, at A1.

Policies Relating to the Mounted Unit

The Mounted Unit, which is a specialized unit of the NYPD, is routinely assigned to demonstrations. The Mounted Unit is authorized to disperse crowds at demonstrations by having the horses go into the crowd to disperse them. There is a risk that a horse may seriously injure a person, and the risk of injury is particularly pronounced for people who are sitting on the ground. The Mounted Unit is used in a variety of ways at demonstrations, including acting as barriers to control the movement of crowds.

The only written guidelines the NYPD has concerning the deployment of the Mounted Unit at demonstrations is contained in pages 34-39 of the Mounted Unit Manual. The Manual contains the following directives, inter alia:

- Avoid physical contact if possible.
- Use only the amount of force necessary to control the situation.
- It is important to provide an avenue of escape when dispersing a crowd. Give them a chance to retreat.
- The most effective crowd control measure is to separate the crowd into small groups. Then disperse them.

Mounted Unit Manual at 34, 36.

Under NYPD policy, the ranking person on the scene has the authority to order the deployment of the Mounted Unit. The NYPD has provided no training about deployment of the Mounted Unit to disperse crowds at demonstrations to members of the NYPD outside the Mounted Unit, with the exception of some training that Chief Esposito testified may have been provided to newly promoted supervisors.

According to the commanding officer of the Mounted Unit, the standard procedure of the unit is to have the horses slowly walk up to a crowd and stop short of making contact with anyone, to have police officers on foot try to make arrests, and then to have the horses proceed into the crowd only in circumstances that are "very, very rare . . . . It would have to be life-threatening." Acerbo Dep. at 37.

CONCLUSIONS OF LAW

Plaintiffs seek a preliminary injunction with respect to the four challenged policies pursuant to 42 U.S.C. § 1983. Plaintiffs allege that the access, pens and Mounted Unit policies violate the First Amendment. The Mounted Unit is also alleged to violate the Fourth Amendment, as is the bag search policy.

Standing

Defendants argue that neither the individual plaintiffs nor the NYCLU has standing to pursue injunctive relief relating to any of the four challenged policies. Because the defendants' argument raises a jurisdictional issue, City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983), it must be addressed first.

In Lyons, the Supreme Court held that in order to satisfy constitutional standing requirements,

> [p]laintiffs must demonstrate a personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions. Abstract injury is not enough. The plaintiff must show that he sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.

Id. at 101-02 (citations and internal quotations omitted). Specifically, a plaintiff must demonstrate that "(1) he or she has suffered an injury; (2) the injury is traceable to the defendants' conduct; and (3) a federal court decision is likely to redress the injury." Deshawn E. v. Safir, 156 F.3d 340, 344 (2d Cir. 1998) (citing Northeastern Florida Contractors v. City of Jacksonville, 508 U.S. 656, 663 (1993)). The Second Circuit has emphasized that

> the fundamental aspect of standing is its focus on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The aim is to determine whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. The standing issue must therefore be resolved irrespective of the merits of the substantive claims.

United States v. Vazquez, 145 F.3d 74, 80-81 (2d Cir. 1998) (internal quotation marks and citations omitted).

To establish standing to seek injunctive relief, a plaintiff "cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future." Deshawn E., 156 F.3d at 344. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects." O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974).

"[A] plaintiff must demonstrate standing for each claim and form of relief sought." Baur v. Veneman, 352 F.3d 625, 641 n.15 (2d Cir. 2003). However, "[f]or federal courts to have jurisdiction over any of these claims, only one named plaintiff need have standing with respect to each claim." Comer v. Cisneros, 37 F.3d 775, 788 (2d Cir. 1994) (citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 263-64 (1977)).

a. NYCLU's Standing

Defendants argue that the NYCLU does not have standing to bring constitutional claims on behalf of its members.

> An organization may have standing in either of two ways. It may file suit on its own behalf "to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." Warth v. Seldin, 422 U.S. 490, 511 (1975). It may also assert the rights of its members under the doctrine of associational standing.

Irish Lesbian and Gay Org. v. Giuliani, 143 F.3d 638, 649 (2d Cir. 1998) (hereafter, "ILGO") (citing Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343-45 (1977)).

The Second Circuit "has restricted organizational standing under § 1983 by interpreting the rights it secures to be personal to those purportedly injured." League of Women Voters of Nassau County v. Nassau County Bd. of Supervisors, 737 F.2d 155, 160 (2d Cir. 1984) (citing Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1974)). Aguayo held that "neither [the] language nor the history . . . [§ 1983] suggests that an organization may sue under the Civil Rights Act for the violations of rights of members." 473 F.2d at 1099 (quoted in League of Women Voters, 737 F.2d at 160).

However, Aguayo also recognized "a narrow exception to the . . . rule barring organizations from asserting the § 1983

claims of its members . . . if the challenged conduct involves an abridgement of associational rights of 'both the association and [its] members.'" Padberg v. McGrath-McKechnie, 203 F. Supp. 2d 261, 275-76 (E.D.N.Y. 2002) (quoting Aguayo, 473 F.2d at 1100). An associational injury would be sufficient to confer standing upon an organization "so long as the challenged [practices] adversely affect its members' associational ties." Warth, 422 U.S. at 511; see also M.O.C.H.A. Society, Inc. v. City of Buffalo, 199 F. Supp. 2d 40, 46-47 (W.D.N.Y. 2002) (association of African-American firefighters held to have standing to challenge alleged discriminatory terminations where each termination reduces organization's membership and its membership dues). The NYCLU has not asserted standing based on any alleged injury to its associational ties. Accordingly, the NYCLU lacks standing to pursue a § 1983 claim on behalf of its members, and must assert standing on its own behalf.

"It is well established that 'organizations are entitled to sue on their own behalf for injuries they have sustained.'" ILGO, 143 F.3d at 649 (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 n.19 (1982)). "[T]he organization must meet the same standing test that applies to individuals by showing actual or threatened injury that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." Id. (internal quotation marks and citations omitted).

In ILGO, the Second Circuit held that the Irish Lesbian and Gay Organization had standing on its own behalf to assert a § 1983 claim for the denial of the opportunity to express its views when the City refused its application to conduct a parade before the annual St. Patrick's Day Parade in Manhattan. The court held that

> An organization, as well as an individual, may suffer from the lost opportunity to express its message. Cf. Pacific Gas and Elec. Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1, 8, 106 S. Ct. 903, 907, 89 L. Ed. 2d 1 (1986) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination or information and ideas' that the First Amendment seeks to foster.") (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783, 98 S. Ct. 1407, 1419, 55 L. Ed. 2d 707 (1978)).

Id. at 650.

In the present case, the NYCLU has established that it has sponsored demonstrations in the past and intends to sponsor more in the future. It has also alleged that three of the four practices it is challenging may prevent the NYCLU from expressing its message as forcefully as it would in the absence of the practices, and hence constitutes a First Amendment violation. It has further alleged that the challenged practices are likely to be deployed at future demonstrations. Although the injuries the NYCLU argues it may suffer in the future may not necessarily "den[y] the organization the opportunity to express its message in the way it

preferred.," id., it has sufficiently alleged that its free speech rights would be impaired, and the alleged impairment constitutes injury in fact for standing purposes.

As to its allegations that the NYPD unreasonably restricts access by providing insufficient information and by placing demonstrators in pens from which they cannot easily enter and exit, the NYCLU has adequately alleged that these policies "will impede or even prevent NYCLU members from attending demonstrations at the [Republican National] Convention." Gutman Complaint at ¶ 62.[2] As to the claim that the Mounted Unit is employed unreasonably, the NYCLU alleges that as currently deployed, the use of the Mounted Unit constitutes an unreasonable time, place, and manner restriction, see Housing Works, Inc. v. Kerik, 283 F. 3d 471, 478 (2d Cir. 2002), and is therefore a First Amendment violation. Focusing only on the allegations and not on the merits, see Vazquez, 145 F.3d at 81, the NYCLU also has standing to challenge the current use of the Mounted Unit as a First Amendment violation.

The defendants argue that the holding in ILGO is restricted to organizations seeking monetary damages for First Amendment violations. It is true that the decision addresses the

[2] Although the NYCLU is precluded from bringing a claim on behalf of its members, the fact that members (as well as non-members) may be impeded from participation constitutes a diminution of the NYCLU's ability to express its message.

specific question "whether ILGO has standing to bring a claim for compensatory damages," and notes that "[t]he denial of a particular opportunity to express one's views can give rise to a compensable injury." ILGO, 143 F. 3d at 649 (emphasis added). However, nothing about the holding indicates that organizations seeking injunctive relief are subject to a different standard. The court holds that standing may be demonstrated, inter alia, "by showing . . . threatened injury," id., which would only be relevant in a suit for injunctive relief. The ILGO court does not seem to have questioned the plaintiff organization's standing to assert its claim for injunctive relief. The district court below observed that "associational standing is usually only recognized where the association seeks a declaration or injunction," Irish Lesbian and Gay Org. v. Giuliani, 949 F. Supp. 188, 197 (S.D.N.Y. 1996), although the Second Circuit ultimately found that the ILGO did have associational standing to seek damages as well.

The defendants further argue that the NYCLU has not demonstrated that it has suffered an injury in fact because it has not been deterred from sponsoring demonstrations.

> Allegations of a "subjective chill [of First Amendment rights] are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." Laird v. Tatum, 408 U.S. 1, 13-14 (1972). "Rather, to establish standing in this manner, a plaintiff must proffer some objective evidence to substantiate his claim that the challenged [regulation] has deterred him from engaging in protected activity." Bordell v. General Elec. Co., 922 F.2d 1057, 1060-61 (2d Cir. 1991).

Latino Officers Ass'n v. Safir, 170 F.3d 167, 170 (2d Cir. 1999). The defendants point out that the events of February 15, 2003 did not deter the NYCLU from sponsoring an event protesting United States Attorney General John Ashcroft on September 9, 2003, and have not deterred it from planning a demonstration in August at the Convention. The NYCLU's claims for standing are not based on allegations that their First Amendment rights have been chilled, but rather that they are likely to encounter the challenged practices in the future. As discussed above, the NYCLU has adequately alleged "a threat of specific harm." Id.

The NYCLU has therefore demonstrated that the First Amendment harms it alleges are injuries for standing purposes. The defendants, however, argue that the plaintiffs have not shown that the NYPD restricts pen movement, deploys the Mounted Unit, and conducts blanket bag searches at every demonstration, nor that it is likely to in the future. The defendants have not contested that the NYCLU is likely to face the access policy at future demonstrations.

While the NYPD does not use pens at every demonstration, Chief Smolka testified that it is generally true that "the standard practice [of the NYPD] in Manhattan South when it knows of a demonstration almost regardless of size is to use pens of one sort or another," and that "when pens are set up, it's expected that that is the area where participants in the demonstration will

assemble." Smolka Dep. at 71. Further, the practice when using such pens is to have openings only at the front and the back. Tr. at 352 (Captain David Meyer). The NYCLU has therefore demonstrated that it is likely to face alleged injury from the pen policy in the future.

The City has not contested that the Mounted Unit is present at nearly every large demonstration, and that the training of officers outside the Mounted Unit is restricted to, at most, the training provided to "[n]ewly promoted supervisors . . . during their course about their promotion." Tr. at 450 (Chief Joseph Esposito). However, the plaintiffs have only alleged that the deployment of the Mounted Unit actually caused injury to demonstrators at one event -- the February 2003 demonstration. While the Mounted Unit was deployed on several occasions at that event, the NYCLU has not shown that the Mounted Unit is likely to be deployed at a future demonstration, or that injury is likely to occur as a result.

The NYCLU's reliance on National Congress for Puerto Rican Rights v. City of New York, 75 F. Supp. 2d 154 (S.D.N.Y. 1999) is misplaced. In that case, the court found that the individual plaintiffs had standing because "defendants' policy . . . has allegedly affected tens of thousands of New York City residents..." 75 F. Supp. 2d at 161. Further, "at least three of the named individual plaintiffs claim they have been [victimized]

by these unconstitutional practices repeatedly." Id. While thousands of people may have been affected by a single deployment of the Mounted Unit, their claims cannot be multiplied in the same manner in order to increase the probability of future injury. Accordingly because the NYCLU has not shown that it faces a likelihood of injury from the Mounted Unit policy in the future, see Deshawn E., 156 F.3d at 144, it has not satisfied the Article III "case or controversy" requirement.

The defendants have not contested that the alleged injury from the access and pens policies are fairly traceable to the City's conduct, or that the granting of an injunction would redress the injury. Id. Accordingly, the NYCLU has met the standing requirements for asserting First Amendment claims on its own behalf challenging the access and pens policies.

The NYCLU has also alleged that the defendants have violated the Fourth Amendment through the use of the Mounted Unit and also through blanket bag searches as a condition for entry at demonstrations. The NYCLU has not alleged any threat of future injury to itself as an organization, nor is it conceivable how the Fourth Amendment rights of the NYCLU could be violated by either practice at a public demonstration. Although the NYCLU may be able to demonstrate a Fourth Amendment injury on behalf of its members, that route has been foreclosed by the prohibition on § 1983 suits by organizations on behalf of members. See League of Women Voters,

737 F.2d at 160. Therefore, the NYCLU lacks standing to challenge the current use of the Mounted Unit and blanket bag searches as violative of the Fourth Amendment.

Individual Plaintiffs

Because standing has been established as to the First Amendment claims with regard to the access and pens policies on which the plaintiffs are seeking an injunction, the standing inquiry with respect to the individual plaintiffs will focus solely on the remaining claims.

As an initial matter, plaintiff Gutman, who died on February 25, 2004, does not have standing to sue for injunctive relief, because future harm to Gutman cannot be shown. See Blake v. Southcoast Health System, Inc., 145 F. Supp. 2d 126, 137 (D. Mass. 2001) (holding that because plaintiff is deceased, she cannot further be harmed by plaintiff's alleged violations of the Americans with Disabilities Act, and therefore "her Estate lacks standing to sue for an injunction.").

To establish standing to seek injunctive relief for the alleged violation of their constitutional rights, the individual plaintiffs must show that they are

> immediately in danger of sustaining some direct injury as the result of the challenged official conduct and [that]

> the injury or threat of injury [is] both real and immediate, not conjectural or hypothetical.

Lyons, 461 U.S. at 102 (citations and internal quotations omitted). In this case, at least one plaintiff must show that he or she would: a) encounter the challenged policy in the future; and b) demonstrate that "the City ordered or authorized police officers to act in such manner." Id. at 105-06; see also Shain v. Ellison, 356 F.3d 211, 216 (2d Cir. 2004).

Stauber has testified that she attended two antiwar demonstrations in the spring of 2002 as well as the March 2004 demonstration, and that she intends to attend the demonstrations planned to coincide with the Convention. Tr. 376-77. Conrad, by contrast, testified at the hearing that although he has an interest in attending future demonstrations, he

> would feel unable to do so because ... the use of the barricades and horses created a situation I felt was dangerous, and I am afraid of similar circumstances being present at the Republican National Convention.

Id. at 85. While the plaintiffs' pre-hearing memorandum of law characterizes Conrad as "extremely wary" about attending future demonstrations, his testimony makes clear he will not attend future demonstrations while the challenged policies are in place. Therefore, only Stauber can satisfy the first prong of the Lyons test. Further, while Conrad's statement of intention is

sufficient to show that he is not likely to face the challenged policies in the future and by itself it constitutes only a "subjective chill" of his First Amendment rights, and is not sufficient to confer standing. See Latino Officers Ass'n v. Safir, 170 F.3d 167, 170 (2d Cir. 1999) ("Allegations of a 'subjective chill [of First Amendment rights] are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'") (quoting Laird v. Tatum, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972)).

Stauber's claim for standing with respect to the Mounted Unit policy as a First or Fourth Amendment violation fares no better than did the NYCLU's claim. Stauber has made no allegation that she suffered any past injury as a result of the Mounted Unit policy, and her likelihood of facing injury in the future is, if anything, less than the NYCLU's. Stauber therefore lacks standing to challenge the Mounted Unit policy.

Stauber has also alleged that the bag search policy is likely to be deployed. The defendants, relying on Lyons, argue conversely that plaintiffs cannot establish standing by presenting evidence that the NYPD used the alleged policies against them in the past, and utilizes them routinely. In Lyons, the plaintiff alleged that he had been subjected to an illegal chokehold and faced a threat of being illegally choked again, based on allegations of at least ten chokehold-related deaths. Lyons, 461

U.S. at 98, 100. The Supreme Court held that the plaintiff did not have standing because "it is not more than conjecture to suggest that in every instance of a traffic stop, arrest, or other encounter between the police and a citizen, the police will act unconstitutionally and inflict injury without provocation or legal excuse." Id. at 108. It was "no more than speculation" to claim that the plaintiff himself would be involved in such an instance. Id.

The facts in the instant case are distinguishable from Lyons. Stauber has declared her intention to attend future demonstrations, including those at the Convention. An encounter with the NYPD, and with NYPD policies, is therefore much more likely than the speculative occurrence in Lyons. With respect to the bag search policy, Stauber alleged in her complaint that as a result of her concerns about the use of pens, she will "carry food and medicine with her to any such demonstrations." Stauber Complaint, ¶ 60. She also testified that she regularly carries a medical kit in order to check her blood sugar level, and that the kit "can be carried in a handbag." Tr. at 377. It is therefore likely that if Stauber attends a demonstration at which bags are being searched, she would be subject to the policy which plaintiffs have alleged violates the Fourth Amendment. Further, as discussed below, the plaintiffs have established that the NYPD effectively authorized the bag search policy. Accordingly, Stauber has standing to challenge the bag search policy.

Mootness

The defendants, however, deny that Stauber is likely to have her bags searched at a future demonstration because the Patrol Bureau Manhattan South discontinued the practice on the advice of the NYPD Legal Bureau approximately one year ago. As the plaintiffs correctly point out, the alleged abandonment of the policy presents an issue of mootness rather than standing. See Dodge v. County of Orange, 208 F.R.D. 79, 85 (S.D.N.Y. 2002) (analyzing allegations that challenged strip-search policy had been changed to conform with the law under mootness standards).

As the Supreme Court has held,

> It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. Such abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power.

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982). "A suit will be rendered moot by a defendant's [voluntary] change in a policy only if it is 'absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." Dodge, 208 F.R.D. at 85 (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)).

No written directive abandoning the bag search policy has been issued, and at least one NYPD official testified that the practice was in effect in May 2004. Persons entering pens at the Salute to Israel parade were asked to open their bags and coolers. Tr. 606-07 (Inspector McEnroy). No one who was asked to open their bags by police refused the request. Id. Finally, Chief Joseph Esposito testified that while the NYPD has no plans to perform blanket bag searches at demonstrations, "it's an option that we like to keep open." Tr. at 473. Stauber's challenge to the bag search policy is therefore not moot.

Municipal Liability

To state a claim under 42 U.S.C. § 1983, a complaint must aver that a person acting under color of state law committed acts that deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or the laws of the United States. See Parratt v. Taylor, 451 U.S. 527, 535 (1984). In order to hold a municipality liable as a "person" within the meaning of § 1983, the plaintiff must establish that the municipality was at fault for the constitutional injury he or she suffered, see Oklahoma City v. Tuttle, 471 U.S. 808, 810 (1985); Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690-91 (1978), in that the violation of the plaintiff's constitutional rights resulted from a municipal policy, custom or practice. See Monell, 436 U.S. at 694; Vann v. City of New York, 72 F.3d 1040, 1049 (2d Cir. 1995).

A plaintiff may satisfy the "policy, custom or practice" requirement in one of four ways. See Moray v. City of Yonkers, 924 F. Supp. 8, 12 (S.D.N.Y. 1996). The plaintiff may allege the existence of (1) a formal policy officially endorsed by the municipality, see Monell, 436 U.S. at 690; (2) actions taken by government officials responsible for establishing the municipal policies that caused the particular deprivation in question, see Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84 (1986) (plurality opinion); Walker v. City of New York, 974 F.2d 293, 296 (2d Cir. 1992); (3) a practice so consistent and widespread that it constitutes a custom or usage sufficient to impute constructive knowledge of the practice to policymaking officials, see Monell, 436 U.S. at 690-91; or (4) a failure by policymakers to train or supervise subordinates to such an extent that it amounts to deliberate indifference to the rights of those who come into contact with the municipal employees. See City of Canton v. Harris, 489 U.S. 378, 388 (1989). There must also be a causal link between the policy, custom or practice and the alleged injury in order to find liability against the city. See Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983).

The analysis of the "policy, custom or practice" requirement with respect to the access and pens policies is made somewhat difficult because plaintiffs may be construed as alleging that the absence of policies relating to notifying the public of alternate means of access and to the means of ingress and egress

from pens amounts to a constitutional violation. It is undisputed that the NYPD does not have official policies in place with respect to either of these practices, although it does have other kinds of policies for dealing with large demonstrations.

With respect to the access policy, the plaintiffs argue that "for years it has been the routine practice of the NYPD to close streets and sidewalks leading to demonstration sites without making provision for informing the public about how otherwise to reach demonstration sites." Plaintiffs' Post-Hearing Memorandum of Law at 29. Defendants argue that the access policy should be construed as a claim that the NYPD either failed to supervise or to train its police officers so as to avoid a constitutional violation and therefore may subject to the City to liability only if "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton, 489 U.S. at 388.

The access policy, however, does not result from the failure to train police officers but from the closure of streets and sidewalks. The plaintiffs' theory is that the limitations on free speech by such closures are not narrowly tailored because the officers on the scene do not provide information which would enable individuals otherwise to reach the demonstration site. See Ward v. Rock against Racism, 491 U.S. 781, 791 (1989) ("a regulation of the time, place, or manner of protected speech must be narrowly

tailored to serve the government's legitimate, content-neutral interests. . .").

The plaintiffs have shown that street and sidewalk closings take place at nearly every major demonstration, and that the NYPD routinely creates written plans showing which streets and sidewalks it intends to close. However, no written information has been made available to event organizers before demonstrations, although organizers have on occasion been notified of street closing plans at pre-demonstration meetings. Further, prior to efforts it made with respect to the March 2004 demonstration, the NYPD had never provided any advance information to the public about the closing of streets and sidewalks leading to demonstration sites. Nor has the NYPD provided written instructions about alternative routes of access to demonstrations to police officers assigned to locations where the Department had closed streets and sidewalks leading to demonstrations. The consistent failure to provide this information to the public or to officers on the scene is sufficient to establish that a widespread practice exists and to subject the City to municipal liability with respect to the access policy.

Regarding the pens policy, the alleged constitutional violations of the NYPD also constitute more than a failure to train or to supervise. The creation of pens with limited ingress and egress is a positive act taken by police officers. The defendants

do not argue otherwise, but instead contend that the use of pens is not so widespread as to have the force of law, and alternately argue that the regulation of ingress and egress is not conducted for unconstitutional reasons.

The plaintiffs have demonstrated that the NYPD routinely uses pens at demonstrations, both large and small, and that persons may leave the pens only from the front and the back. Pens are used a large stationary rallies as a means of keeping cross streets and emergency lanes open, as well as to prevent individuals being crushed from a large and unmanageable crowd. Pens are also used at smaller events such as the Salute to Israel Day parade, where groups with a history of antagonism may need to be separated. While it may be true that the number of demonstrations at which pens is used is low in proportion to the total number of demonstrations which occur in New York City every year, that does not disprove that the practice of using pens with limited ingress and egress is a widespread one. In addition, the plaintiffs have also adequately demonstrated that the First Amendment violations they allege would result from the NYPD's pens policy. The plaintiffs have therefore satisfied the "policy, custom or practice" requirements to establish municipal liability as to the pens policy.

The defendants improperly rely on Davis v. City of New York, 228 F. Supp. 2d 327 (S.D.N.Y. 2002), aff'd 75 Fed. Appx. 827,

2003 WL 22173046 (2d Cir. Sep. 22, 2003) for the proposition that in order "to hold a municipality liable for the acts of its employees . . . the plaintiff must also prove that the final policymaking authority knew that the subordinates took that action for unconstitutional reasons." 228 F. Supp. 2d at 341. Defendants cite Davis in connection with both the access and pens policies. This doctrine is inapplicable, however, to the present constitutional challenge to these policies because according to the plaintiffs' theory the violations of the First Amendment from the NYPD's limits on ingress and egress and from closing streets without providing access information result not from any improper motivation on the part of any individual police officers but from the fact that both policies are not narrowly tailored time, place and manner regulations. Had the plaintiffs objected that particular police officers were making decisions relating to the provision of access information or to ingress and egress for reasons relating to the content of the demonstrator's speech, the objection would be appropriate. The plaintiffs, however, have made no such objection.

Regarding the bag search policy, the plaintiffs have established that the NYPD had, or still has, a practice of requiring people seeking to attend certain demonstrations to consent to a search of their possessions as a condition of entry to the demonstration site. While there is no directive from the Commissioner ordering bag searches to take place, Inspector Moscatt

testified that in one-third of the approximately 20 to 30 demonstrations he policed after October 2001, the NYPD searched the bags of those entering the demonstration area. Tr. 335-36. At the pro-war demonstration planned for April 10, 2003, the NYPD issued "Special Instructions" to its officers to search bags and to refuse entry to anyone who does not consent to a search. Further, the possessions of persons seeking to enter the Salute to Israel Day parade in May 2004 were also searched. Although bags are not searched at every demonstration, the plaintiffs have established that the practice is sufficiently widespread, at least at demonstrations in which the NYPD believes there may be security concerns, to have the force of law. Because the bag search policy is also clearly linked to the Fourth Amendment injury alleged by the plaintiffs, the City is subject to municipal liability for the bag search policy.

Preliminary Injunction Standards

"Where, as here, a moving party seeks a preliminary injunction to stay 'government action taken in the public interest pursuant to a statutory or regulatory scheme,' that party must show irreparable harm in the absence of an injunction and a likelihood of success on the merits." Latino Officers Ass'n v. Safir, 196 F.3d 458, 462 (2d Cir 1999) (quoting New York Magazine v. Metropolitan Transp. Auth., 136 F.3d 123, 127 (2d Cir. 1998)). The defendants argue that the plaintiffs must meet a higher standard

because they seek a "'mandatory' injunction, that is, [one] that it 'will alter, rather than maintain, the status quo . . . by commanding some positive act.'" Nicholson v. Scoppetta, 344 F.3d 154, 165 (2d Cir. 2003) (quoting Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 33-34 (2d Cir. 1995)).

> [A] mandatory injunction should issue "only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief." The "clear" or "substantial" showing requirement -- the variation in language does not reflect a variation in meaning -- thus alters the traditional formula by requiring that the movant demonstrate a greater likelihood of success.

Id. (quoting Tom Doherty, 60 F.3d at 34). The relief sought with respect to the bag search policy is prohibitory in nature, and would not command a positive act. The relief plaintiffs seek with respect to the pens policy is not as clearly prohibitory. Depending on whether the relief is characterized as ordering the City to make provisions for greater ingress and egress from pens, or as lifting undue restrictions, the preliminary injunction could "be considered either mandatory (altering the status quo) or prohibitory (maintaining the status quo), given that the distinction between the two 'is often more semantical than substantive.'" Forest City Daly Housing, Inc. v. Town of North Hempstead, 175 F.3d 144, 150 n.6 (2d Cir. 1999) (quoting Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 43 (2d Cir. 1997)). Because the latter description most accurately

describes the nature of the plaintiffs' claim, the plaintiffs need only show a likelihood of success on the merits.

A. Irreparable Harm

Although it is generally true that the mere allegation of a constitutional injury is sufficient in this Circuit to show irreparable harm, Statharos v. New York City Taxi and Limousine Comm'n, 198 F.3d 317, 322 (2d Cir. 1999), the doctrines with respect to the First and Fourth Amendments differ, and must be considered separately.

1. First Amendment - Access & Pens Policies

The Second Circuit has promulgated two doctrines on the issue of whether irreparable harm may be presumed from the plaintiffs' allegation of a First Amendment violation:

> On the one hand, we have said that since violations of First Amendment rights are presumed to be irreparable, the allegation of a First Amendment violation satisfies the irreparable injury requirement. Tunick v. Safir, 209 F.3d 67, 70 (2d Cir. 2000). On the other hand, we have suggested that, even when a complaint alleges First Amendment injuries, irreparable harm must still be shown -- rather than simply presumed -- by establishing an actual chilling effect. See Latino Officers Ass'n v. Safir, 170 F.3d 167, 171 (2d Cir. 1999).

Bronx Household of Faith v. Board of Educ. of City of New York, 331 F. 3d 342, 349 (2d Cir. 2003). However, the court clarified the

doctrine, holding that the "tension" between the two doctrines "is more apparent than real":

> Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed ... . In contrast, in instances where a plaintiff alleges injury from a rule or regulation that may only potentially affect speech, the plaintiff must establish a causal link between the injunction sought and the alleged injury, that is, the plaintiff must demonstrate that the injunction will prevent the feared deprivation of free speech rights.

Id. Not surprisingly, the plaintiffs argue that both the access and the pens policies directly affect speech, while the defendants argue that speech is only potentially affected.

Courts have found a direct limitation on speech, and therefore presumed irreparable harm, where state regulation has the immediate effect of curtailing speech, or where speech will be prevented or punished if particular conditions are not met. See, e.g., Bronx Household of Faith, 331 F.3d at 350 (board of education's policy of prohibiting "religious services or religious instruction" in school facilities entitled to presumption of irreparable harm); Tunick, 209 F.3d at 70 (denial of permit to conduct photographic shoot of nude models); Latino Officers Ass'n v. City of New York, 196 F.3d at 462 (prevention of association of Latino police officers from marching in uniform in certain parades); Bery v. City of New York, 97 F.3d 689, 693-94 (2d Cir. 1996) (city regulation preventing artists from selling their

work in public without a vendor's license). By contrast, when the regulation burdens the exercise of First Amendment rights but does not prevent it, a causal link must be shown. See, e.g., Latino Officers Ass'n v. Safir, 170 F.3d at 171 (the "conjectural chill" from an NYPD requirement that officers notify the department of their intention to speak before a governmental agency or a private organization about department policy found insufficient to establish irreparable harm); Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv., 766 F.2d 715, 722 (2d Cir. 1985) (reversing a preliminary injunction enjoining employee's discharge pending arbitration because discharge did not chill First Amendment rights of members of union sufficiently to cause irreparable harm). In this context, presence at a demonstration, and therefore access to it, is a form of speech and assembly in a public forum, and accordingly "receives a more heightened protection under the First Amendment." United Yellow Cab Drivers Ass'n, Inc. v. Safir, 98 Civ. 3670, 1998 WL 274295, at *7 (S.D.N.Y. May 27, 1998).

While the limitation on speech as a result of the access and pens policies may be less significant than the denial of a permit or other prohibitions on the rights of entire groups to assemble, it is no less direct. See Piscottano v. Murphy, No. 3:04CV682, 2004 WL 1093374, at *4 (D. Conn. May 14, 2004) ("existing case law does not seem to place any minimum on the First Amendment interest a party must assert to qualify for the irreparable harm presumption.").

The closing of streets and sidewalks is a direct limitation on the right of demonstrators to assemble at a demonstration. While it is clear that there are numerous legitimate justifications for such closings, including that they may enable the expression of speech by providing for an orderly demonstration, it is nonetheless true that closing streets, and funneling demonstrators into particular entry routes is a limitation. The parties disagree on whether the closing of streets and sidewalks without providing access information is a constitutional violation. However, that question pertains to the plaintiffs' likelihood of success on the merits. Irreparable harm as to the access policy has accordingly been shown.

With respect to the pens policy, plaintiffs have testified that demonstrators were told by police officers that they could not leave or re-enter a particular pen. Assuming that such limitations are First Amendment violations, the injury is immediate rather than conjectural. Even if the injury could be described as an indirect burden on speech, the plaintiffs have shown that a causal link exists because of the prohibition on exit and re-entry by police officers, if only for a short period of time. See Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,"); Bronx Household of Faith, 331 F.3d at 349. The plaintiffs have therefore established irreparable harm as to the pens policy.

2. Fourth Amendment - Bag Search Policy

Because plaintiffs have challenged the bag search policy as violative of the Fourth Amendment, irreparable harm may be presumed. "The law is well-settled that plaintiffs establish irreparable harm through 'the allegation of fourth amendment violations.'" Doe v. Bridgeport Police Dept., 198 F.R.D. 325, 335 (D. Conn. 2001) (quoting Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 744 (2d Cir. 2000)); see also Dodge, 282 F. Supp. 2d at 72 ("The alleged violation of a constitutional right suffices to show irreparable harm.").

Likelihood of Success on the Merits

The plaintiffs argue that the pens and access policies constitutes an unjustified "time, place and manner" restriction. The Supreme Court has held that

> the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for the communication of the information.

Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); see also United for Peace and Justice, 323 F.3d at 176. The plaintiffs have not alleged that the NYPD

bases its limitations on access information or its restrictions on ingress and egress on the content of the demonstrators' speech, nor have they challenged the use of street closings or pens generally. The prudent use of street closings and pens clearly serves the NYPD in the discharge of its duties to preserve public peace and order, "disperse unlawful or dangerous assemblages and assemblages which obstruct the free passage of public streets [and] sidewalks," and to "regulate, direct, control and restrict the movement of vehicular and pedestrian traffic for the facilitation of traffic and the convenience of the public as well as the proper protection of human life and health." New York City Charter § 435(a). See also Cox v. Louisiana, 379 U.S. 536, 554, 555 (1965) ("Governmental authorities have the duty and responsibility to keep their streets open and available for movement."); Concerned Jewish Youth v. McGuire, 621 F.2d 471 (2d Cir. 1980) (NYPD restriction of protestors to "bull pen" across the street from Russian Mission reasonable in view of government interest in safety).

A. Access Policy

Defendants first argue that the access policy is not a time, place and manner limitation because no individuals were prevented from reaching a demonstration site at the February demonstration. In support, defendants cite the testimony of Lt. Gannon, who stated that if people continued walking north, "[t]hey would have ultimately made it First Avenue, absolutely." Tr. at

552. Plaintiffs, however, have not alleged that the lack of access information made it impossible to attend the demonstration, but only that it was made unreasonably difficult to attend for many people. Even if it could be shown that others similarly situated to Angelos and her family, who gave up after ending up in a pen away from the demonstration site, had persisted in attempting to reach the demonstration until succeeding would not show that no limitation exists.

Because a time, place, and manner restriction exists, the defendants "bear the burden of demonstrating that [it] is narrowly tailored to serve a significant governmental interest." Housing Works, Inc. v. Safir, 101 F. Supp. 2d 163, 170 (S.D.N.Y. 2000) (citing Eastern Connecticut Citizens Action Group v. Powers, 723 F.2d 1050, 1052 (2d Cir. 1983)). The defendants attempt to shift this burden by arguing that the plaintiffs have shown no "First Amendment right to access information." Def.'s Post-Hearing Mem. at 13. However, it is the defendants that must show the law enforcement or public safety purposes that failing to provide access information serves.

Plaintiffs argue that defendants have not shown that the failure to provide access information serves any legitimate governmental interest, and is therefore not narrowly tailored.

> [T]he requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government

> interest that would be achieved less effectively absent the regulation. To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

Ward, 491 U.S. at 799 (internal quotations and citations omitted). Plaintiffs argue that, to the contrary, the evidence suggests that the NYPD's interests would be served by providing such information. Commissioner Kelly testified that he believed that "any way we can better communicate -- when I say we, I mean the organizers of an event and the police department -- that's a good thing." Kelly Dep. at 86-87. Chief Joseph Esposito acknowledged that affirmative steps by the NYPD to facilitate access to demonstrations, like posting access information on its web site, providing materials to organizers, posting signs at closed access points, and having sound trucks at closed access points "are all good and useful things," Tr. 471-72, and would not undermine the Department's legitimate law enforcement interests. Id. at 466. Chief Smolka also testified that it "[a]bsolutely" makes his job easier if people know how to get into a demonstration. Smolka Dep. at 196.

The fact that many of the means of notifying the public about access suggested by the plaintiffs were used by the NYPD at the March 2004 demonstration further shows that their absence at other demonstrations violates the narrow tailoring requirement. In First Amendment litigation against the City, the Second Circuit and

other court have found narrow tailoring violations where less restrictive means of speech regulation have already been found successful. See, e.g., Bery, 97 F.3d at 697-98 (finding that City's numerical limit on vending licenses not narrowly tailored to prevent crowd management and street congestion where the sections of the City's Administrative Code "already achieve these ends without such a drastic effect" and exceptions from the limit were numerous); Housing Works, Inc. v. Safir, 98 Civ. 4994, 1998 WL 409701, at *3 (S.D.N.Y. July 21, 1998) (granting preliminary injunction holding that 25-person limit on events on steps of City Hall not narrowly tailored because of the City's "prior and current practice of allowing more than 25 people to participate in press conferences, without incident"); United Yellow Cab Drivers, 1998 WL 274295, at *3 (granting preliminary injunction and holding that NYPD directive limiting size of taxicab protest not narrowly tailored in consideration of "at least four processions of larger numbers of taxicabs in the past [by plaintiffs] without opposition of the police department or City Hall.").

In consideration of the fact that no security, safety or organizational interests would be harmed by the NYPD making efforts to inform persons of the means by which they can access demonstration sites, the NYPD's current policy or practice of closing streets and sidewalks at demonstrations without making reasonable efforts to provide information about access is an insufficiently narrowly tailored time, place or manner restriction

because it unnecessarily burdens the ability of persons to attend demonstrations.

The defendants argue, and they are certainly correct, that the First Amendment does not obligate the NYPD to provide all interested persons with detailed directions to a demonstration even as the NYPD is contending with near-riot conditions and attacks on police officers, as it was during portions of the February 2003 demonstration. The resources of the NYPD are limited, and public safety and the maintenance of order must always be top priorities. Nevertheless, there are numerous steps the NYPD may take in advance of a demonstration to facilitate access to demonstrations, including those that were implemented at the March 2004 demonstrations. Each officer at the scene of the demonstration should know the initial plan for pedestrian access, and should be kept abreast of updated information if that is consistent with the fulfillment of more pressing duties. As the contrast between the February 2003 and March 2004 demonstrations shows, the timely provision of such information to the public can help prevent the improper massing of crowds at unauthorized locations at the former demonstration, which helped to contribute to the chaos which officers faced on that day.

The plaintiffs have therefore shown that they are likely to succeed on their First Amendment challenge to the access policy.

The request for injunctive relief with respect to the access policy is granted.

B. Pens Policy

Defendants argue that the alleged limitations on ingress and egress do not rise to the level of a time, place and manner restriction because no demonstrator was unreasonably barred from exiting or re-entering the pens. For example, defendants argue the Reverend Kooperkamp was able to leave and re-enter a pen during the February 2003 demonstration despite some delays. Kooperkamp testified, however, that the only reason he was able to re-enter the pen was that the police officer who had prohibited him from re-entering left his post. Further, the testimony of Stauber and the CCRB Report of her complaint establish that she was repeatedly prohibited from exiting a pen, despite her protests that she needed to use the bathroom.

The plaintiffs argue, as they do with the access policy, that the pens policy is not a sufficiently narrowly tailored speech regulation. According to plaintiffs, allowing greater access to and from pens would not compromise the NYPD's interests in safety or in maintaining order, and would lift the burden on the movements of demonstrators.

In support, plaintiffs cite the testimony of Chief Joseph Esposito, who stated that "nothing about configuring pens so people can leave to go to the bathroom or to go to a nearby store" or to go home "would undermine the department's legitimate law enforcement interest or concerns about terrorism." Tr. at 468. Chief Esposito further testified that nothing about configuring pens at a demonstration so that people who leave a pen could re-enter a pen if there was room would undermine the Department's legitimate law enforcement interests so long as that could be done under controlled circumstances. Id. at 468-69. Chief Smolka also testified that providing written instructions concerning the movement of people in and out of barricaded areas is a good idea, Smolka Dep. at 201, and Chief Esposito stated that written instructions would not disserve the NYPD's interests. Finally, Commissioner Kelly testified that "generally speaking," it is a good idea to give police officers instructions about the rules concerning demonstrators being able to move in and out of pens. Kelly Dep. at 98.

At the March 2004 demonstration, although pens were not used, the barricades that were used along the sidewalks contained openings so that demonstrators could leave the barricaded areas and go on to the adjoining sidewalks. Further, written instructions were issued stating that demonstrators should be allowed to leave the demonstration site, although the sidewalk pedestrian traffic of demonstrators was restricted. Each NYPD official testifying with

regard to the March 2004 demonstration considered it a success in terms of safety and order.

The defendants' arguments are made primarily in defense of the use of pens generally. Despite the testimony of some witnesses who dislike pens or believe them unnecessary, plaintiffs have not made a categorical challenge to the use of pens. Defendants also argue that "stripped of the authority to exercise some control over pen departures and re-entries, the NYPD would achieve the City's crowd control and safety interests less effectively." Def.'s Pre-Hearing Mem. at 14. Creating greater opportunities for ingress and egress, however, need not remove any authority from the NYPD relating to exercise control over the movement of demonstrators. For example, creating more openings in pens so that demonstrators could enter and exit pens from the side would not mean a loss of control over access because police officers could man each opening. Nor would such an arrangement exacerbate any manpower problems the NYPD may face at a large demonstration, as officers are routinely assigned around the perimeter of a pen even when openings have only been created at the front and back. See Deposition of Officer Dolores Pilnacek at 46-47 (officers assigned "all along the side" of a pen despite no opening at the side).

In consideration of the fact that no security, safety or organizational interests would be harmed by the NYPD making efforts

to assure greater access by demonstrators to and from pens, the NYPD's current policy or practice of using pens at demonstrations is an insufficiently narrowly tailored time, place or manner restriction because it unreasonably limits the movement of demonstrators.

The defendants argue that even if the plaintiffs could show a lack of narrow tailoring, a likelihood of success has not been demonstrated because ample alternative means of communication are still possible. As noted above, the defendants bear the burden of establishing that its speech regulations are narrowly tailored. Because it has been held that the defendants have not met their burden, the plaintiffs are therefore not further required to demonstrate the absence of alternative means of communication because the narrow tailoring and alternative means requirements are stated by the Supreme Court in the conjunctive rather than in the disjunctive. See Ward, 491 U.S. 791 (restrictions must be "narrowly tailored . . . and . . . leave open ample alternative channels"). Even if plaintiffs were required to show that ample alternative means did not exist, they could do so, as an unreasonable limitation on leaving a pen may leave an individual with no alternative but to remain at a demonstration when she would prefer not to participate any longer. Under some circumstances, such an unnecessary detainment of an individual could constitute a First Amendment violation. See Lewis v. Cowen, 165 F.3d 154, 161 (2d Cir. 1999) ("The First Amendment protects the right to refrain

from speaking just as surely as it protects the right to speak.") (citing Wooley v. Maynard, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)).

The plaintiffs have therefore shown that they are likely to succeed on their First Amendment challenge to the pens policy. The request for injunctive relief with respect to the pens policy is granted.

C. Bag Search Policy

In challenging the NYPD's policy of blanket bag searches at certain demonstrations, plaintiffs rely primarily on the Second Circuit's decision in Wilkinson v. Forst, 832 F.2d 1330 (2d Cir. 1987). In Wilkinson, members of the Ku Klux Klan (the "Klan") challenged a police policy of conducting searches of automobiles and pat-down searches of individuals at a series of demonstrations without regard to whether individuals were suspected of carrying weapons. Id. at 1335. Police officials had implemented the search once they learned that the Klan and some anti-Klan groups had planned demonstrations and counter-demonstrations in the same town, and that "Klan members expressed an intention to arm themselves for purposes of self-defense" and the members of at least one anti-Klan group "would be armed (though not with firearms) and ready to attack Klansmen." Id. at 1332-33.

The checkpoints that were set up to search automobiles and individuals were highly successful at confiscating potentially harmful or deadly weapons. At one rally, officials seized well over a hundred weapons, including clubs, machetes and axes. Id. at 1335. Despite the argument of government officials that the searches they performed in fact served the First and Fourteenth Amendment interests of the plaintiffs as well as the citizenry generally by allowing the rallies to take place in peace, id. at 1337, and the court's recognition that "the court orders and searches played an important role in inhibiting the Klan members from bring firearms to those rallies," id. at 1338, the Second Circuit upheld "the district court's conclusion that the mass pat-down searches . . . went beyond the bounds established by the fourth amendment." Id. at 1340.

The decision to uphold the prohibition on the searches was made by "balancing the need for the particular search against the invasion of personal rights that the search entails," and by considering "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it was conducted." Id. at 1338 (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

The Wilkinson court, however, modified the injunction put in place by the district court so as to exclude from prohibition "general magnetometer screenings at future Klan rallies in

Connecticut." Id. at 1341. The court found that the use of a magnetometer, or metal detector, "does not annoy, frighten or humiliate those who pass through it . . . No stigma or suspicion is cast on one merely through the possession of some small metallic object." Id. at 1340 (quoting United States v. Albarado, 495 F.2d 799, 806 (2d Cir. 1974)).

The plaintiffs argue that Wilkinson is directly on point, and mandates the prohibition on blanket bag searches as a condition for entry to demonstrations. The defendants argue that bag searches or other searches of possessions are much closer to magnetometer searches than pat-down searches, and note that none of the plaintiffs allege any pat-downs or frisks in their complaints. In support, defendants cite United States v. Edwards, 498 F.2d 496 (2d Cir. 1974) (Friendly, J.), which held that "[t]he search of carry-on baggage [at an airport], applied to everyone, involves not the slightest stigma." Id. at 500.

Edwards is distinguishable, however. First, the bag search in that case took place only after the alarm on the airport's magnetometer was triggered when the defendant passed through the device while carrying her beach bag. Id. at 499 & n.8; see also Wilkinson, 832 F.2d at 1339 ("the airport and courtroom cases have sanctioned only magnetometer searches in the first instance.").

Second, the search of a person's bag is not minimally intrusive, as the defendants argue. In Bond v. United States, 529 U.S. 334 (2000), the Supreme Court held that the physical manipulation of the outside of a bus passenger's soft luggage implicated the Fourth Amendment. The Court distinguished cases involving flyovers of property by planes and helicopters "because they involved only visual, as opposed to tactile, observation." 529 U.S. at 337. The Court then observed that although the defendant's bag is "not part of his person . . . travelers are concerned about their carry-on luggage . . . [and] generally use it to transport personal items that, for whatever reason, they prefer to keep close at hand." Id. at 337-38. A demonstrator would have an even greater expectation of privacy in a bag kept on their person at all times because "a bus passenger who places a bag in an overhead bin . . . expects that passengers or bus employees may move it for one reason or another." Id. at 338. A search of a demonstrator's bag therefore more closely resembles the manipulation of the outside of a bag than a magnetometer search, which "has none of the personal indignities or humiliations of physical searches or the like." Legal Aid Society of Orange County v. Crosson, 784 F. Supp. 1127, 1130 (S.D.N.Y. 1992).

Third, a search at an airport poses no danger of discouraging constitutionally protected expression. See Edwards, 832 F.2d at 498 ("recognition of the historical background of the [Fourth] Amendment, with its stress on the seizure of books and

papers on political affairs and the search of homes for illegally imported goods, helps to determine when an exception is justified."). The Wilkinson court did not place as much emphasis on the location of the searches as did the district court because airport searches implicate the constitutional right to interstate travel. 832 F.2d at 1339. However, the court noted that "[s]ome of the sites in question, public streets and so forth, are indeed traditional public forums within the meaning of relevant first amendment jurisprudence." id.; see also Lamb v. City of Decatur, 947 F. Supp. 1261, 1265 (C.D. Ill. 1996) ("The fact that this is a Fourth Amendment case and not a First Amendment case does not diminish the First Amendment protections available to the plaintiffs."). Unlike airports, bag searches are not ubiquitous at public assemblies, and the decision to search bags at some events rather than others may carry with it some stigma, even if the decision to search is content-neutral.

Fourth, unlike in Edwards, the NYPD has given no advance notice of its intent to perform bag searches at particular demonstrations. Police officials have testified that there is no written policy for deciding when bag searches will be conducted. At the Salute to Israel parade, the decision to conduct searches was made by police officers on site. The airport searches in Edwards were deemed reasonable, inter alia, so long as "the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air."

498 F.2d at 500 (quoting United States v. Bell, 464 F.3d 667, 675 (2d Cir. 1972) (Friendly, J., concurring)). As the bag search policy is presently implemented, demonstrators may come from out of town only to find that they must choose between having their bags searched or not attending the demonstration.

The primary difference between the instant case and Edwards, however, is that the evidence submitted by the defendants of the increased risk of violence or of threats to public safety that would be created from the failure to search the bags of demonstrators is overly vague. Defendants have noted that the United States government considers the Convention to be a potential terrorism target, and newspaper reports published after the hearing in this case confirm these concerns. However, the defendants have provided no information to suggest that the bag search policy will address the kinds of threats that the NYPD may face at demonstrations.

By contrast, the use of magnetometer searches in Edwards and Wilkinson, as well as the bag search policy in Edwards, were all implemented in response to specific information about the threats faced by officials. See Wilkinson, 832 F.2d at 1340 (magnetometer searches permitted given "the asserted primary purpose of the searches to eliminate firearms from the rally sites"); Edwards, 498 F.2d at 501 ("The weapon of the skyjacker is not limited to the conventional weaponry of the bank robber or the

burglar.") (quoting Bell, 464 F.2d at 674). Given the record before the Court, the defendants have not shown that the invasion of personal privacy entailed by the bag search policy is justified by the general invocation of terrorist threats, without showing how searches will reduce the threat. Accordingly, plaintiffs' request for injunctive relief with respect to the bag searches is granted.

It must be emphasized, however, that the ban on searches at demonstrations is not categorical, and may be justified under different circumstances:

> Where such a need is legitimately presented in another context, we do not believe that public authorities should be considered powerless to respond to it in an effective manner, or that such a need cannot legitimately be weighed in the constitutional balance in evaluating searches under the fourth amendment.

Wilkinson, 832 F.2d at 1339; see also Chandler v. Miller, 520 U.S. 305, 323 (1997) ("where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable" -- for example, searches now routine at airports and at entrances to courts and other official buildings."). No application need be made to this court to seek prior approval if in the judgment of the NYPD the threat to public safety meets the standards laid out in Wilkinson and Edwards.

Balance of Equities

Defendants argue that even if plaintiffs can show a likelihood of success -- as they have with respect to the access, pens, and bag search policies -- relief must be denied because the balance of equities favors the defendants. It is true that

> when a federal district court crafts an injunction to vindicate a plaintiff's protected rights, it cannot simply order whatever a City is physically capable of doing, without regard to considerations of public health, safety, convenience, and cost. On the contrary, the Court must make a sound exercise of equitable discretion that considers all the relevant circumstances.

Million Youth March, Inc. v. Safir, 155 F.3d 124, 126 (2d Cir. 1998). None of the factors presented by the defendants, however, tips the balance against injunctive relief with respect to the two policies.

Defendants urge the consideration of public safety, in particular during the upcoming Convention. The consideration of safety has already been taken into consideration in determining whether relief is appropriate. Defendants also argue that the plaintiffs' unclean hands undermine any entitlement to relief. In support, defendants cite the conduct of UPJ, who were represented by the NYCLU. The conduct of UPJ may not be imputed to the NYCLU because of its representation of the organization. Even if it could, none of the conduct cited relates to either the pens policy or the bag search policy.

Finally, defendants argue that the principles of federalism disfavor the oversight of NYPD operations by a district court. The Supreme Court has held that where "the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." Rizzo v. Goode, 423 U.S. 362, 378, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976) (internal quotations and citations omitted).

The extension of the intrusion on the NYPD's discretion over its policymaking must be balanced with the constitutional injuries that are likely to result in the absence of an injunction. With respect to the access and pens policies, the relief sought by plaintiffs is fairly minimal, requiring only that the NYPD make reasonable efforts to notify individuals of the means of access to demonstrations, as it did at the March 2004 demonstrations, and to make reasonable accommodations for the entry and exit of demonstrators when configuring pens at demonstrations. No oversight of the NYPD is required, nor would it be helpful as the leadership of the NYPD is best equipped to decide how to achieve the objectives of the access and pens injunctions. In contrast, the injunctions would serve to prevent what has been found to be irreparable harm from the free speech limitations imposed by NYPD policies. Accordingly, concerns about federalism do not tip the

equities in defendants' favor with regard to the access and pens policies.

Concerning the bag search policy, the requested "injunction does no more than require the police to abide by constitutional requirements." Allee v. Medrano, 416 U.S. 802, 814 (1974). Any injunction should not categorically prohibit bag searches without reasonable suspicion, but only require that the police must find that the "risk to public safety is substantial and real", Chandler, 520 U.S. at 323, and that a blanket bag search would serve to reduce that risk.

As the plaintiffs point out, the Second Circuit has previously enjoined the conduct of the NYPD with regard to public demonstrations, often without discussion of federalism issues. See, e.g., Latino Officer Ass'n v. City of New York, 196 F.3d 458 (2d Cir. 1999) (affirming preliminary injunction enjoining NYPD from preventing officers from participating in march in NYPD uniforms); Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996) (reversing denial of preliminary injunction and enjoining NYPD from enforcing licensing scheme against artists seeking to sell artwork on public streets). Courts in this district have similarly entered injunctions after finding that the NYPD's policies or practices violated constitutional standards. See, e.g., Metropolitan Council, Inc. v. Safir, 99 F. Supp. 2d 438 (S.D.N.Y. 438 (S.D.N.Y. 2000); (granting preliminary injunction and enjoining NYPD from

arresting persons sleeping on public sidewalk as part of protest); Million Youth March, Inc. v. Safir, 63 F. Supp. 2d 381 (S.D.N.Y. 1999) (granting preliminary injunction and enjoining NYPD from prohibiting march from taking place). In comparison with the injunctions issued in these cases, the intrusiveness into NYPD practices in requiring the provision of access information and greater access to pens and in prohibiting searches without a specific threat is minimal. Defendants have therefore failed to show that the balance of the equities requires the denial of the requested injunctive relief with respect to these two policies.

CONCLUSION

For the reasons, stated above, the plaintiffs' claim for relief with respect to the access policy is granted and the NYPD is enjoined from closing streets and sidewalks at demonstrations without making reasonable efforts to notify persons how they can otherwise access the demonstration sites.

The plaintiffs' claim for relief with respect to the Mounted Unit is denied for lack of standing.

The plaintiffs' claim for injunctive relief with respect to the access policy is granted, and the NYPD is enjoined from unreasonably restricting access to and participation in demonstrations through the use of pens. No particular action is

required to be taken by the NYPD, although creating a larger number of openings which may be monitored by police officers may alleviate the problem.

The plaintiffs' claim for injunctive relief with respect to the bag search policy is granted, and the NYPD is hereby enjoined from searching the bags of all demonstrators without individualized suspicion at particular demonstrations without the showing of both a specific threat to public safety and an indication of how blanket searches could reduce that threat. Less intrusive searches, such as those involving magnetometers, do not fall within the scope of the injunction.

Submit preliminary injunction on notice.

It is so ordered.

New York, NY
July 16, 2004

ROBERT W. SWEET
U.S.D.J.